IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Lamberth)
v.	)	
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO RECONSIDER THE OCTOBER 22, 2004 MEMORANDUM OPINION

Shorn of Plaintiffs' name-calling, Plaintiffs' Opposition to Defendants' Motion to Reconsider the October 22, 2004 Memorandum Opinion ("Opposition"), confirms that the statements regarding "retaliation" that Defendants ask the Court to reconsider were not supported by evidence before the Court.[1] In their Opposition, Plaintiffs do not point to any information that was not already discussed in Defendants' Motion.[2]

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[1] Plaintiffs seek to turn the burden of proof on its head and argue that after Plaintiffs claimed retaliation by Interior, Defendants somehow then assumed the burden to prove that no such retaliation had occurred. Opposition at 2, 8, 9 n.11. The Court of Appeals recently confirmed that such a view is untenable. See Cobell v. Norton, 391 F.3d 251, 259 (D.C. Cir. 2004).

[2] The only possible exception is a reference in the Opposition to a June 2004 Inspector General Report. Opposition at 4 n.5. It is difficult to understand how a report that was issued four months before the alleged retaliation took place, which does not mention or discuss any matter related to Cobell, and which relates primarily to events that occurred at Interior before Secretary Norton even took office, see U.S. Department of the Interior, Office of Inspector General, June 2004 "Report on Evaluation of Conduct and Discipline," No. E-EV-MOA-0068-2002, at 1 ("Although many, if not most, of our findings pre-dated your tenure as Secretary . . . .") (attached as Exhibit 1 to the Opposition and available at http://www.oig.doi.gov), could possibly provide support. Indeed, Plaintiffs make no such claim, but rather simply attack Defendants for not "addressing" this Report in the Motion. Opposition at 4 n.5.

Plaintiffs do not address in their Opposition the discussion, Defendants' Motion at 4-10, about the possible interpretations of the Court's September 29 Order immediately after that Order was issued and before the Court clarified its meaning.[3] As to the factual statements in the Court's October 22 Memorandum Opinion regarding Defendants' actions, Plaintiffs' Opposition does not support the absolute statements made in the Court's Opinion, but rather attempts to show that more qualified pronouncements would have been justified. For example, with respect to the Court's statements that the BIA was entirely shut down and field offices were closed, Cobell v. Norton, 224 F.R.D. 266, 270 (D.D.C. 2004), Plaintiffs do not try to show that this was true. Instead, they seek to show that the Court would have been justified in stating that immediately after the September 29 Order banning certain communications was issued, communications were indeed restricted – perhaps overly so for a few days after the Court clarified the meaning of its September 29 Order on October 1 – at three BIA field offices. Opposition at 6-7.[4]

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[3] Perhaps Plaintiffs were attempting to fashion some such discussion in the paragraphs on page 5 of their Opposition, but if so, their argument is difficult to discern.

[4] Plaintiffs also suggest that they would have been able to provide a few additional examples where communications were restricted, but the witnesses wished to remain anonymous, notwithstanding the direction from the Court to identify them, because they "had concerns about retribution." Opposition at 8 n.10. As the Court told Plaintiffs' counsel, Defendants cannot be expected to investigate and refute such evanescent claims. See October 6, 2004, Tr. at 18:1-2 (if Interior is not given the names of those complaining, "[h]ow does that allow the defendants to contest the basic information?"); id. at 20:9-11 ("You can provide their names and affidavits to the defendants, and then they can quit shadow boxing and get the true facts."). In any event, Plaintiffs do not claim that these anonymous individuals would be able to support the statements that the BIA was shut down and field offices were closed.

With respect to language in the Court's Opinion that all live telephone operators were replaced with recordings, 224 F.R.D. at 270, Plaintiffs refer to this statement as a "strawman argument" and "immaterial." Opposition at 8 n.11. In the end, they merely restate the information discussed in Defendants' Motion (at 14-15) regarding the single instance when a recording may have been posted at the Anadarko agency. See id.

Plaintiffs also do not address the opinion's statement that "in numerous cases, [employees told] the Indian beneficiaries that their checks were being withheld as a direct result of this Court's Order." 224 F.R.D. at 270. As discussed in Defendants' Motion, Plaintiffs had only provided one instance where any such thing may have occurred, and even if true, checks were not sent out by the local employee who may have made such a statement in error. Motion at 17-18.

With regard to the Opinion's statement that "[t]he entire process by which payments are made to IIM account holders from lease revenues, royalties, and so forth was similarly shut down," 224 F.R.D. at 270, Plaintiffs do not try to show that this was correct. They merely engage in a statistical sideshow to try to demonstrate that in the three business days after the September 29 Order was issued, a lower number of checks than usual were issued.[5] Plaintiffs arbitrarily focus on three-day periods. Opposition at 13-15. Plaintiffs' focus on the first three days of October 2004, as being the low point for the two-month period, which Defendants acknowledged, Motion at 16, when an average of 254 checks went out each day. However,

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[5] Plaintiffs also unaccountably attack the Declaration of Robert Winter as "evidentiarily incompetent" because he attested that the information he provided was true and correct to the best of his knowledge, information and belief. Opposition at 2 n.3. The Court of Appeals already rejected this argument. Cobell, 391 F.3d at 260.

looking at the first four days of October 2004, Interior issued an average of 521 checks,[6] totaling 415 (24.9%) more checks, worth $459,016.91 (58.4%) more, than in 2003. They ignore the fact that almost ten times more checks were issued on September 30, 2004 (the day Interior allegedly ordered checks stopped) (3,100 to 334), worth $199,471.74 more, than on that date in 2003.

They blame the alleged stoppage on Special Trustee Ross Swimmer's September 30, 2004 email (Plaintiffs' Exhibit 7), which shows it was sent at 7:54 a.m. and forwarded at 8:04 a.m. But Plaintiffs' theory cannot be reconciled with the fact that on September 30 3,100 checks, worth almost half a million dollars, went out. In fact, the checks were never stopped. Beginning with September 30, on the first five business days after the Court's September 29, 2004 order, Interior issued 3,181 (158.9%) more checks, worth $658,488.65 (60.8%) more, than during the same period in 2003.

In short, no checks were withheld as retaliation for the Court's order. Plaintiffs do not, and cannot, point to a single example where a trust check was withheld.

As Defendants' Motion established – and Plaintiffs' Opposition confirms – Defendants did not retaliate against anyone as a result of the Court's September 29 Order.[7] The Opinion's

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[6] Two four-day periods in 2004 and 2003 featured lower average daily check totals, including the second through fifth business days of September 2004, which averaged only 349 checks, and those same days in 2003, which averaged 397 checks.

[7] Plaintiffs' irrelevant assertion that Interior has retaliated against other individuals earlier in this case, Opposition at 3, is untrue and vigorously disputed by Interior. There is no evidence of a single instance of retaliation related to this litigation. Particularly disturbing, however, is Plaintiffs' unsupported assertion that Defendants and their counsel "orchestrated" a "vicious personal attack" on the Court. Id. at 3 n.4. Plaintiffs' counsel's malicious accusation that Defendants and their counsel "aided and abetted" the publication of Professor Pierce's recent article critical of the Court, id., is made without a shred of evidence.

statements to the contrary are not supported by evidence and thus justice requires that the Court reconsider its October 22, 2004 Memorandum Opinion.

CONCLUSION

For these reasons, and for the reasons in Defendants' Motion to Reconsider, the Motion should be granted.

Dated: January 18, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 18, 2005 the foregoing *Defendants' Reply in Support of Motion to Reconsider The October 22, 2004 Memorandum Opinion* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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